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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1269

SIDNEY J. UNGAR AND
S. J. UNGAR REALTY AFFILIATES, INC.,
Petitioner,

v.

HON. JAMES J. LEFF,
Justice of the Supreme Court,
New York County,
Respondent.

SIDNEY J. UNGAR,
Petitioner,

v.

NAHIM ISAIAS AND
WATER FRONT SERVICE STATIONS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

PETITIONERS' REPLY BRIEF

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The opposition on behalf of Judge Leff in the prohibition action argues principally that certiorari should be denied because of the availability of an appeal in the proceedings to which the prohibition

action relates. It argues further that petitioner's plenary suit to enforce the settlement agreement is under consideration in the Federal courts, that Judge Leff apparently made a correct decision in ruling that there was not a settlement, that Judge Leff undoubtedly formed an unfavorable opinion of petitioner "after reading the motion papers in the proceedings below, and after reading the entire record," but that "this is not a bias which prevented a fair decision," and that the claim of any pervading bias is belied by the fact that Judge Leff ordered the reference in the foreclosure action to proceed before the same Referee previously designated by Judge Fine and followed the recommendations of the Referee.

As noted in the petition, petitioner's application for an order of prohibition asserted a denial of due process under the United States Constitution deriving from Judge Leff's manifest bias and prejudice, his determination of a controlling issue without a hearing, and his continuation of an injunction damaging to petitioner which, according to the Judge's own findings, served no purpose other than to punish petitioner. The Appellate Division ordered the application denied and the petition dismissed without rendering an opinion explaining its reasons. The decisions of the New York Court of Appeals make clear that the availability of an appeal does not preclude an order of prohibition and that an order of prohibition will be granted where it provides a more effective remedy to protect constitutional rights. *Martinis v. Supreme Court*, 15 N.Y. 2d 240, 206 N.E.2d, 165 (1965); *Hogan v. Court of General Sessions*, 296 N.Y. 1, 68 N.E.2d 849 (1946); *Baltimore Mail S.S. Co. v. Fawcett*, 269 N.Y. 379, 199 N.E. 628 (1936); *Culver Contracting Corporation v. Humphrey*, 268 N.Y. 26, 196 N.E. 627 (1935).

As to the remaining reasons set forth in the opposition, petitioner's plenary suit in the United States District Court to enforce the settlement agreement has been dismissed in the interest of federal-state comity with the statement that petitioner "can seek vindication of his federal rights in the state appellate courts and, ultimately, if necessary, in the Supreme Court." (See Appendix to Brief of Respondent Isaias, p. 24). The suggestion that Judge Leff's decision was "apparently" correct, which is most vigorously disputed, does not justify the denial of a fair trial and the deprivation of due process resulting from manifest bias, the determination of a controlling issue without a hearing, and a decision based on vindictiveness contrary to the Judge's findings. The arguments that there was no bias on the theory that Judge Leff merely formed an unfavorable opinion of petitioner after reading the motion papers in the proceedings below and that he followed the recommendations of the Referee designated by Judge Fine are similarly baseless. A simple reading of the extreme epithets uttered by Judge Leff with respect to petitioner, both orally and in his opinion, demonstrate that the basis for them cannot be found in the pleadings in the case. The statement that Judge Leff followed the recommendations of the Referee is obviously in error since he increased the award of interest by $119,000 and the attorney's fee allowed by $24,800.[1]

The appropriateness of the remedy of prohibition is highlighted by the effect of Judge Leff's continuation of the injunction as an act of retributive vengeance notwithstanding his finding that "it appears unquestioned" that "the injunction against demolition could

[1] Respondent's statement that petitioner had the use of money at the rate of 7% per annum was also in error since the Court's judgment fixed interest rate at 15-3/4%. Moreover, it appears from the proceedings below that funds were available to petitioner from the Chase Manhattan Bank at 6% or less.

be vacated without prejudice to the payment of Isaias' claim." The petition sets forth the loss of revenue of from $3,500 to $5,000 per month as a result of the injunction. Unless petitioner can obtain forthwith a fair hearing before an unbiased Judge on both the necessity for continuation of the injunction and on the question whether there had been a settlement agreement with respect to all the related litigation,[2] these losses will continue through protracted appeals in the Appellate Division and the Court of Appeals, and possibly further hearings on remand in connection with the amount owing in the foreclosure action which is now on appeal in the Appellate Division as both respondents point out.[3] Furthermore, one of the "related actions" is a suit for defamation brought by respondent Isaias' attorney against petitioner which has not yet come to trial.

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[2]After Judge Leff had decided without a hearing that the parties had not entered into a settlement agreement before Judge Fine, petitioner field a motion in all the related actions, including the separate injunction action, for a hearing on whether a settlement of these actions had been made on April 28, 1971, and requesting that Judge Leff disqualify himself from hearing and determining the motion. This motion also raised the due process questions under the United States Constitution which are raised in this petition. On March 27, 1972, the Appellate Division affirmed an order of Judge Leff denying this motion. (See Appendix to Brief of Respondent Isaias, p. 17.) On April 20, 1972, the Appellate Division denied leave to appeal.

[3]The petition in the present case does not seek review of any of the rulings in the foreclosure action but only the final judgments in the action for an order of prohibition and the separate action brought by Respondent Isaias in which an injunction against demolition was granted. If petitioner is successful in having reversed the final judgments in these actions, he will be protected against the continuing and substantial losses resulting from the injunction and the right to a fair hearing before an impartial tribunal in the continuing proceedings will be safeguarded.

Respondent Isaias' brief opposes certiorari in both the prohibition and injunction actions on grounds which, for the most part, are entirely baseless if not frivolous.[4] The opposition argues that the petition with respect to prohibition was untimely, that there is no jurisdiction because it does not raise a federal question respecting the validity of a State statute, that the records of proceedings in the courts below were not filed in this Court, that the order of the Appellate Division of January 25, 1972, is not a final judgment, that an appeal in the injunction action was abandoned, and that the Appellate Division held that petitioner had waived his claim of a settlement agreement.

The claim that the petition with respect to prohibition is untimely obviously overlooks the settled rule that the time for filing a petition is computed from the date of the order denying leave to appeal and not from the date of the original order. *American Railway Exp. Co.* v. *Levee*, 263 U.S. 19, 21. The contention that the petition should be dismissed because the records in the proceedings below were not filed in this Court obviously overlooks Rule 21 of the current Rules of this Court which states that "the filing of the record in this Court is not a requisite for docketing the petition."

Respondent's objection that this Court has jurisdiction to decide only a federal question respecting the validity of a State statute disregards the language of 28 U.S.C. 1257(3) that this Court may review by writ of certiorari final judgments or decrees of State Courts "where any * * * right * * * is specially set up or claimed under the Constitution * * * of the United

[4] Although it is stated that respondent Isaias intervened and filed opposing papers in the prohibition proceeding, the order of the Appellate Division of September 21, 1971, indicates that it acted solely upon the pleadings and argument of petitioner and the Attorney General. (Appendix to Petition, pp. 3a-4a.)

States". In both the prohibition proceeding and the injunction action, as the petition demonstrates, petitioner specially set up the claim that the due process clause of the Fourteenth Amendment of the United States Constitution entitled him to a fair trial before an impartial Judge, as well as a hearing before the adjudication of any question affecting important substantive rights, and that the actions of the courts below deprived him of this constitutional right.

Respondent's objection that the Appellate Division's order of January 25, 1972, is not a final judgment is based upon the misconception that petitioner seeks review of all asepcts of that order. The petition makes clear that it relates only to the dismissal of the appeal with respect to denying vacation of the judgment of injunction. Respondent's opposition recognizes that the injunction action is a separate action and that a final judgment has been rendered in that proceeding. It argues that petitioner abandoned his appeal from the grant of the injunction and that that action has become final. Petitioner did abandon his appeal from the original grant of a permanent injunction in the suit instituted by respondent Isaias. Thereafter, on the basis of new circumstances, petitioner moved for vacation of the injunction in accordance with well established principles of equity. This motion was denied. The dismissal of the appeal with respect to the denial of this motion which left the permanent injunction to continue in effect is the final judgment to which the petition relates.

Respondent's claim that the Appellate Division has ruled that petitioner has abandoned his claim based on the settlement agreement, and consequently the right to a hearing thereon, is entirely without foundation. The opinion quoted by respondent related to a motion in the foreclosure action and can be construed to mean no

more than that, in the state of the proceedings then before the court, there was "no basis for impeding the progress of the foreclosure action." Petitioner has promptly and vigorously pursued his right to a hearing on the settlement issue. The absence of any abandonment of the settlement agreement is evidenced by petitioner's immediate informal efforts to have a hearing on the settlement issue which are described in the petition, his attempt to have the Appellate Division's judgment clarified with respect to the procedure for a hearing, his formal motion in the four related actions for a hearing, and the plenary action instituted in the United States District Court based upon the settlement agreement.

Respectfully submitted,

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